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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO) et al.,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Respondents.

ANSWERING BRIEF OF RESPONDENT MAUI AGRICULTURAL COMPANY, LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

TERMS USED IN THIS BRIEF

In this brief, for convenience, the Petitioners for the Writ of Certiorari are referred to as the "Petitioners," the combined Petition for Writ of Certiorari and Brief in Support Thereof are referred to as the "Petition," and the Respondent Maui Agricultural Company, Limited, is sometimes referred to as the "Respondent Company."

STATUTES INVOLVED

The statute primarily involved is the Norris-LaGuardia Act (Act of Mar. 23, 1932, 47 Stat. 70, 29 U.S.C. 101-115)

as stated on p. 2 in the Petition. If the Sherman Act, Sec. 3 (Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 3) and the Clayton Act, Sec. 20 (Act of Oct. 15, 1914, 38 Stat. 730, 738, 29 U.S.C. 52) are involved, as contended by Petitioners, which this Respondent denies, then the Hawaiian Organic Act (Act of Apr. 30, 1900, 31 Stat. 141) is also involved, especially Sections 1 (31 Stat. 141, 48 U.S.C. 493), 5 (31 Stat. 141, as am. May 27, 1910, 36 Stat. 443, 48 U.S.C. 495), 6 (31 Stat. 142, 48 U.S.C. 496), 10 (31 Stat. 143, 48 U.S.C. 501), 11 (31 Stat. 144, 48 U.S.C. 505), 55 (31 Stat. 150, 48 U.S.C. 562), 81 (31 Stat. 157, 48 U.S.C. 631), 82 (31 Stat. 157, 48 U.S.C. 632), 83 (31 Stat. 157, 48 U.S.C. 635), 84 (31 Stat. 157, 48 U.S.C. 636) and 86 (31 Stat. 158, 48 U.S.C. 641-5) thereof. The Norris-LaGuardia Act, Sec. 3 of the Sherman Law, portions of Sec. 1 and Secs. 6 and 20 of the Clayton Act, supra, are printed in the Appendix to the Petition. The above cited sections of the Hawaiian Organic Act are quoted in Appendix A to this brief.

QUESTION PRESENTED

The question presented is not as broad as stated in the Petition, p. 2. Actually, the only question presented is:

Is a circuit court of the Territory of Hawaii a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable to such a circuit court?

STATEMENT OF THE MATTER INVOLVED

Exception is taken to the statement in the first paragraph on p. 3 of the Petition characterizing the ex parte temporary restraining order issued by Territorial circuit judge Wirtz as one which "prohibited picketing in company camps or towns used for residence purposes, and prohibited mass picketing defined as groups larger than three." First, there is nothing in the Petition for the Writ of Prohibition or in

the record to show that the picketing prohibited was in "company camps or towns used for residence purposes" and the statement as to "company camps or towns" is now made for the first time in this court apparently as an afterthought. Furthermore, while the court prohibited mass picketing in crowds on or near the premises of the Respondent Maui Agricultural Company, Limited, because of evidence of violence over a period of a month immediately preceding the order, *which violence has never been denied* by the Petitioners in the Petition for Writ of Prohibition or otherwise at any stage of this case, it did not define mass picketing as picketing by groups of more than three, but simply limited picketing to a maximum of three pickets at points of ingress to and egress from the Petitioner's property. The statement is also immaterial, because the terms and form of the injunction are not involved in this case, and no question was raised below by Petitioners as to the form of the injunction, Petitioners having admitted in open court before the Territorial Supreme Court that the restraining order was in conformity with the laws of the Territory (R. 58, 77), nor could this point have been raised in proceedings for a writ of prohibition if the Norris-LaGuardia Act does not apply.

The statement in the last paragraph on p. 4 of the Petition to the effect that

> The respondent judge granted the ex parte order limiting peaceful picketing to three *because of the Territorial law prohibiting unlawful assemblies and riots,* (italics added)

is both immaterial and inaccurate, for reasons hereinafter shown. (Post; pp. 26-27.)

All of these allusions to the form of the restraining order, the "company camps or towns" and the restriction of mass picketing appear to be injected for the purpose of raising a constitutional issue which was neither mentioned nor

raised at any stage of these proceedings, whether in the Petition for Writ of Prohibition (R. 15-21), the Petition for Rehearing in the Territorial Supreme Court (R. 73-76) the Assignments of Error (R. 5-7) or otherwise. On the other hand, in their own Petition for Rehearing before the Territorial supreme court (R. 73), the Petitioners stated: "The lawfulness of the Temporary Restraining Order under the laws of the Territory, and the Constitution and laws of the United States — other than the Norris-LaGuardia Act — is not in issue and was not argued before this court in this cause."

The statement of facts also fails to show that, after granting the Motion for a Temporary Restraining Order and fixing the return day for Monday, October 28, 1946 (Exhibit 12 to Answer and Return of Cable A. Wirtz, R. 92-93), the Respondents had ample opportunity to move to quash or set aside the Temporary Restraining Order or to ask for the correction of any alleged deficiencies in the form or terms of the Temporary Restraining Order, and themselves twice requested continuances of the return day, which continuances were granted (Exhibits 13 and 13-A to Answer and Return of Cable A. Wirtz, R. 93), without Petitioners taking any steps whatsoever to seek correction of such alleged deficiencies by Judge Wirtz. Instead the Petitioners chose to seek relief by Petition for Writ of Prohibition which questions only the *jurisdiction* of the lower court to act and not the form or terms of the Temporary Restraining Order.

The statement in the last paragraph on pages 6-7 of the Petition, quoting the Territorial Supreme Court's alleged interpretation of the definition of "court of the United States" in the Norris-LaGuardia Act, is incomplete, because it takes but one paragraph of the opinion of the Territorial supreme court out of its context. All that that court really held was that the Norris-LaGuardia Act did not apply to Territorial circuit courts, and, of course, the reasoning of

the court is immaterial if its conclusion is correct, as we submit that it is.

Finally, footnote No. 3 to this paragraph, on p. 6 of the Petition, further strays from the true issues of this case. There is no basis whatsoever, from the record or otherwise, for the inference drawn by this note, immaterial though it obviously is, that *"as a result"* of the unreported Territorial circuit court decision in *Neves v. Reber* in 1938, which is not even quoted in the Petition, "the application of the Norris-LaGuardia Act to territorial circuit courts was not questioned." Territorial circuit court decisions are neither printed, officially indexed except by title, nor regarded as binding precedents in the Territory.

REASONS FOR GRANTING THE WRIT

The Reasons Nos. I to VI, inclusive, set forth in the Petition (pp. 7-13) are inaccurate in their statements or assumptions as well as unsound in their reasoning and present no substantial basis for granting the Writ. This will be brought out in the Argument *infra,* taking each such reason in order.

SUMMARY OF ARGUMENT

Reason No. I is unsound, for construction of the term "court of the United States," used in sec. 13 (d) of the Norris-LaGuardia Act, as not including territorial courts is not new, and the application of the Act to the Federal district court in Hawaii is not involved in this proceeding, although it can be held applicable through the adoptive provisions of Sec. 86 of the Hawaiian Organic Act, thereby giving full effect to the public policy expressed in the Act.

There is no conflict between the lower court's decision and the decisions of this court, particularly the *Hutcheson* case as alleged in Reason No. II.

Reason No. III ignores the autonomy granted by Congress to territorial courts and the territorial legislature, and the separation between those courts and the federal

district court in Hawaii. It is clear, both from the terms of the Norris-LaGuardia Act and its legislative history, as well as the decisions of this court construing the same, that our separate system of autonomous territorial courts was never intended to be covered by that Act.

Reason No. IV is unsound, because, assuming that all acts enumerated in Sec. 4 of the Norris-LaGuardia Act are legalized under all laws of the United States (as to which there is some doubt), and that the rights granted by that Act are substantive, as contended, the question of infringement of the alleged substantive rights is not raised by the record, nor do those alleged substantive rights supersede the local law of the Territory.

Reason No. V alleging "apparent conflict" of the decision below with that of a three-judge district court in *ILWU v. Ackerman,* Civil Nos. 828 and 836, U.S.D.C. Hawaii, is trivial and obviously untrue.

As to Reason No. VI, neither (1) the question as to the reasonableness of the temporary restraining order issued by the territorial circuit court sought to be restrained by writ of prohibition, or of its constitutionality or validity under the Clayton and Norris-LaGuardia Acts by reason of its form and effect, nor (2) the right of the territorial circuit court to proceed on separate criminal contempt charges, is in issue in this proceeding.

Hence, no substantive reason exists for granting certiorari.

ARGUMENT

REASON NO. I (PETITION 7-8)

In Paragraph I under the heading "Reasons for Granting the Writ," Petitioners assert that the court below decided a federal question of substance never determined by this Court. This is so only in the limited sense that the Norris-LaGuardia Act has not heretofore been held inapplicable to territorial circuit courts. However, it is not true insofar

as concerns the general ruling that the term "court of the United States" does not include territorial courts, as to which there is a multitude of applicable rulings of this Court. See *American Ins. Co. v. Canter* (1828), 1 Pet. 511, 546, 7 L. ed. 242, and many other cases summarized in *McAllister v. United States* (1890), 141 U.S. 174, 35 L. ed. 693, 11 S. Ct. 949, cited by the court below (R. 107). See also *Mookini v. U. S.* (1938), 303 U.S. 201, 82 L. ed. 748, 58 S. Ct. 543; *Young v. U. S.* (C.C., W.D., Okla., 1910), 176 F. 612, 615.

The further statement under this paragraph (Petition 8) that "the effect" of the lower court's "decision is to deny to . . . residents of . . . territories and possessions . . . the protection and benefits of a most important national labor law, and to becloud the rights of these persons under other interrelated federal laws," is likewise misleading. All that the Territorial supreme court and the 9th Circuit Court of Appeals held in ultimate effect was that the Norris-LaGuardia Act did not apply to the *purely local circuit courts* of the Territory of Hawaii. Whether the Act applies to the Federal, though not constitutional, United States District Court in the Territory, was not necessary to be, and was not, decided. However, there is no good reason, if and when that question is presented, why it should not be held that, through the adoptive provisions of Sec. 86 of the Hawaiian Organic Act (31 Stat. 158, 48 U.S.C. 641-5, amended June 25, 1948, c. 646, Pub. Law 773, 80th Cong., 2d Sess., 1948, Sec. 8), the Norris-LaGuardia Act became applicable to such Federal district court in this Territory, thereby giving *the same full scope* to the latter Act in Hawaii as in any State of the Union. The Act of June 25, 1948, Sec. 8, supra, amending Sec. 86 of the Hawaiian Organic Act, makes this even clearer now.

The statement that this decision beclouds the rights of territorial residents under other interrelated federal laws (Petition 8) is a red herring. It has no such effect. The

alleged "interrelated federal laws" are the Sherman and Clayton Acts. These two Acts can be given full scope in the Territory of Hawaii by holding that they are applicable to the Federal district court in Hawaii under the adoptive provisions of Sec. 86 of the Hawaiian Organic Act supra, without including within their scope the purely local territorial circuit courts.

Nor do we concede that the court below used a "narrow procedural approach" (Petition 8) in construing the Norris-LaGuardia Act. On the contrary, the court adopted the obvious and natural meaning of the terms used in the Act and gave them the full scope that the context of the Act warranted — a meaning also fully sustained by the legislative history of the Act as a law primarily designed to operate upon the jurisdiction and procedure of Federal courts.[1]

Finally, the contention (Petition 8) that the lower court's construction of the Act "permits courts created by Congress to flout the public policy of the United States declared in the Act, and results in giving to legislative courts created by Congress in the territories and possessions greater power in the issuance of injunctions in labor disputes than constitutional federal courts have" is unsound. The public

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[1] The title to the Act is "An Act to amend the judicial code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes" (47 Stat. 70). Mr. Justice Frankfurter, to whose views great deference was paid by Congress in enacting the Act, as shown by the House and Senate Judiciary Committee reports (Senate Report No. 163, 72d Cong., 1st Sess., p. 3; House Report No. 669, 72d Cong., 1st Sess., p. 12) in his partial dissent in the *United States v. United Mine Workers* (1947), 330 U.S. 258, 313, 91 L. ed. 884, 923, 67 S. Ct. 677, 705-6) said:

. . . The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act "to define and limit the jurisdiction of courts sitting in equity." It *does not deal with the rights of parties* but with the *power of the courts.* Again and again the statute says "no court shall have jurisdiction," or an equivalent phrase. Congress was concerned with the *withdrawal of power from the federal courts* to issue injunctions in a defined class of cases. (Emphasis added.)

policy declared by the Act is expressly limited to "courts of the United States" as defined in that Act and the so-called "substantive" effect of the Act is also expressly limited to any "law of the United States." It was never intended to go any further than to affect the jurisdiction and procedure of those courts and to limit the coverage of Federal criminal statutes over certain labor dispute activities. A court not intended to be covered by the Act operating in a field of local law not intended to be covered by the Act, cannot therefore be "flouting" the public policy declared in the Act. Furthermore, there are numerous respects in which our local territorial circuit courts, being courts of general jurisdiction, ever since their creation have enjoyed broader powers than the United States District Court in Hawaii, or Federal courts in the States, so that such a situation is the rule rather than the exception. For instance, until the enactment of the new Judicial Code, when for the first time diversity of citizenship (28 U.S.C. 1332) was made a ground for Federal jurisdiction in a Territory (See *Avery v. King* (1900) 1 U.S.D.C. Hawaii 12), many cases in Hawaii usually cognizable in the Federal district courts by reason of such diversity could not under any circumstances be tried in the Federal courts, but were triable exclusively in the local territorial courts.

REASON NO. II (PETITION 8-9)

Ground No. II (Petition 8-9) contends that the lower court's decision is in conflict with the decisions of this court, citing particularly *United States v. Hutcheson* (1941) 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788, and implies that the lower court's holding that territorial circuit courts are not covered by the Norris-LaGuardia Act would effect the "absurd result . . . that an unamended Sherman Act and an unamended Clayton Act are in force in the territories and possessions," although the *Hutcheson* case held that the Norris-LaGuardia Act in effect amended the Sherman and

Clayton Acts. Both the statement and its implication are untrue. The Sherman and Clayton Acts are undoubtedly in force in Hawaii, and, whatever may be their scope, they are enforceable, not in the local circuit courts, but in the Federal district court in Hawaii. Hence giving the same scope to the Norris-LaGuardia Act in Hawaii as the Sherman and Clayton Acts which they amend, involves nothing more than the possible extension of the inhibitions of the Norris-LaGuardia Act to the Federal district court in Hawaii — the only court in Hawaii to which the Sherman and Clayton Acts extend. The trouble with this contention of Petitioners is that it attempts to imply from the coverage of the Sherman and Clayton Acts over "commerce," "persons" and *Federal courts* in a Territory, an intent to cover *both Federal and local circuit courts* for purposes of the Norris-LaGuardia Act, which is a palpable *non-sequitur*.

REASON NO. III (PETITION 9-10)

Ground No. III (Petition 9-10) is largely a repetition of Grounds Nos. I and II, supra, and equally without merit.

In connection with determining the meaning of the term "court of the United States," in the Norris-LaGuardia Act, so as to determine its possible application to courts of Hawaii, it should be remembered that the Norris-LaGuardia Act is a general Federal law, applicable generally to Federal courts, and that the Hawaiian Organic Act — the special Federal law applicable specially and only to Hawaiian courts — can not be ignored. Throughout the entire history[2] of the Territory of Hawaii, Congress has

[2] See HAWAIIAN COMMISSION MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES," APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII (Document No. 16, 55th Cong., 3d. Sess.), pp. 162-4;

consistently taken particular care to leave to the Territorial legislature and the Territorial courts the question as to when and upon what evidence our courts of law and equity may exercise their powers, and the procedure of those courts. And the history[2] and terms[3] of the Hawaiian Or-

and Report No. 305, p. 19, of House Committee on Judiciary on H. R. 2972 (House Reports, Vol. 2, Nos. 246-486, Misc., 56th Cong., 1st Sess., 1899-1900, Sr. No. 4022), which bill was later incorporated by the House into S. 222, which was finally enacted as the Hawaiian Organic Act (see House Report No. 549 on S. 222; House Reports, Vol. 3, Nos. 587-807, Misc., 56th Cong., 1st Sess., 1899-1900, Sr. No. 4023). This Report No. 305, among other things stated, at p. 21:

> To this report may be added that the foundation of the legal system of the islands is the common law of England, and that the penal laws and practice is codified, and there are no penal offenses except those enumerated in the code. The civil law in its practice and procedure is partially codified.
>
> In view of the foregoing report it must be considered wise and safe to provide for the organization of the Territorial courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii, and this has been done in the present bill. The reasons also stated in the report for the separation of Federal and Territorial jurisdiction and the creation of a new judicial district of the United States for the islands and the establishment of a district court sufficiently explain and sustain the provisions for such a court in section 87 of the bill.

The debates on the bill in Congress emphasize even more strongly the Congressional intent to set up separate court systems in Hawaii, one purely Federal, and the other purely Territorial or local, just as in a State. 33 Cong. Rec. 1871, 1929, 1932-4, 2025, 2123-4, 2133, 2189, 2191-4, 2388-9, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649 and 4733, the last being a conference report on the bill which stated:

> The amendments to Section 86 in effect separate the Territorial from the Federal jurisdiction in courts of the Territory of Hawaii, as provided in the House bill, the provision for appeals from the supreme court of Hawaii to the ninth judicial circuit being stricken out and the jurisdiction of the United States district and circuit courts is conferred upon the Federal court established.

Excerpts from some of the foregoing citations of the Congressional Record are printed in Appendix B to this brief.

[3] The Hawaiian Organic Act fully recognized and perpetuated this separate autonomy of the Territorial legislature and courts. See Secs. 10, 11, 55, 81, 82 and 83, and 86 (48 USCA 501, 505, 562,

ganic Act indicate an unmistakeable Congressional intent to grant to the Territorial legislature and courts practically the same autonomy as that of a State with respect to jurisdiction and procedure of the local courts, among other things, and to entirely separate the jurisdiction and procedure of the Federal court (the United States District Court for the District of Hawaii) in Hawaii from that of local Territorial courts. Hawaii is unique in the history of all Territories of the United States in respect of this autonomy, granted from its very inception.[4]

631, 632, 635, 641-5; Appendix A hereof); *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466-7. In sec. 86 (48 USCA *641-5*) supra, Congress differentiated expressly between "courts of the United States," meaning the United States District Court for Hawaii, and "courts of the Territory," and provided that the relationship between the two should be the same as that between Federal courts and State courts in a State. This autonomy has been recognized and emphasized in numerous decisions.

In *Kawananakoa v. Polyblank* (1907) 205 U.S. 349, 51 L. ed. 834, 27 S. Ct. 526, this court held that by the Organic Act Congress organized for the Territory a sovereign government, having immunity from suit without its consent, and that such a government is itself "the fountain from which rights ordinarily flow."

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 260-263, 82 L. ed. 235, 242-3, 58 S. Ct. 167, 170-171, the court held provisions of the Puerto Rican Organic Act similar to ours to be "as broad and comprehensive as language could make it," and that the aim of such acts was to grant "full power of local self-determination, with an autonomy similar to that of the states..."

See, also, *In re Craig* (1911) 20 Haw. 483, 490, *Yerian v. Territory of Hawaii* (9 Cir. 1942) 130 F. 2d 786, 788, as to *power of taxation and police power.*

This legislative autonomy extends to the courts. Referring to the Organic Act the United States Attorney General has said (emphasis added):

> Indeed, it would be difficult to frame language more clearly subjecting to legislative change *the whole matter* of "the *laws of Hawaii* heretofore in force *concerning courts and their jurisdiction and procedure*" and "relative to the judicial department..."
>
> 23 Ops. Attys. Gen. U.S. 539, 543.

[4] The courts have held that the *jurisdiction and powers of our Territorial courts are practically those of a State court,* that the relationship between the Territorial courts on the one hand and

The contention (Petition 9) that the lower court's construction of sec. 13 (d) of the Norris-LaGuardia Act (29 U.S.C, 113 (d) reduced the legislative definition to the absurd conclusion that "court of the United States" means "court of the United States" ignores the real reason why Congress enacted the definition reading:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

That reason, of course, was that Congress could not affect the constitutionally conferred original jurisdiction of the Supreme Court (as for instance where a State might sue for an injunction in a labor case) and used this definition to avoid any question as to constitutionality,[5] as well as to insure that District of Columbia courts, theretofore almost universally regarded as not being constitutional inferior

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the Federal courts, including the U. S. District Court in Hawaii, is substantially the same as that between State courts and Federal courts in a State, and that in these respects the purely Territorial judicial system was unique in the history of Territories. See *Hind v. Wilder's S. S. Co.* (1900) 13 Haw. 174, 182; *Wilder's S. S. Co. v. Hind* (9 Cir. 1901) 108 F. 113, 114-116; *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466, 467.

See also *Yeung v. Territory of Hawaii* (9 Cir., 1942) 132 F. 2d 374, 378 as to the complete separation of Territorial and Federal courts.

Furthermore, this court has, particularly with respect to a Territory having a dual system of courts (Territorial and Federal) like Hawaii's, emphatically adopted the rule that the decisions of such Territorial courts on matters of local law or local concern are generally controlling on the Federal appellate courts.

> *Waialua Agricultural Co. v. Christian* (1938) 305 U.S. 91, 106-109, 83 L. ed. 60, 70-72, 59 S. Ct. 21, 29-30.

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[5] See remarks of Sen. Blaine, 75 Cong. Rec. 4625-6; Sen. Norris, Id. 4682; Rep. McKeown, Id. 5486; Rep. Garber, Id. 5493; Senate Report No. 163, of the Senate Judiciary Committee, 72d Cong., 1st Sess., pp. 10-11, 25; and H. Rept. No. 669, of the House Com-

courts, and hence possibly not "courts of the United States would be unquestionably included."[6]

These circumstances, together with (1) the fact, referred to by the lower court (R. 108-9), that both the committee reports and the debates on the Act indicate clearly that only Federal inferior or constitutional courts were intended to be covered, (2) the fact that no abuses by territorial courts were even mentioned nor were territorial courts remotely considered or referred to, (3) the well-defined meaning of the term "court of the United States" as including only consitutional courts, and, finally, (4) the inconsistencies of the Act itself (Sec. 10 and 11) with the interpretation claimed by the Petitioners pointed out in the decision below

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mittee on the Judiciary, 72d Cong., 1st Sess., pp. 3-5, 11, which, among other things, says, with reference to sec. 13- (d) of the Norris-LaGuardia Act:

> The definitions also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the inferior Federal courts.

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[6] The words "including the courts of the District of Columbia" appear to have been inserted in the definition because of the language of the Supreme Court in *Ex Parte Bakelite Corporation*, 279 U.S. 438, 450, 49 S. Ct. 411, 413, 73 L. ed. 789, 793, decided three years before the Norris-LaGuardia Act was passed, to the effect that the courts of the District of Columbia were legislative rather than constitutional courts. The *Bakelite* decision attracted considerable attention and was widely written up in the law reviews in 1930, two years before the Norris-LaGuardia Act was passed as supporting this view. See 24 Ill. L. Rev. 820 (Mar. 1930); 10 B. U. L. Rev. 81 (Jan. 1930); 28 Mich. L. Rev. 485, 518, Note 87 (Mar. 1930). In an article in 43 Harv. L. Rev. 894, entitled "Federal Legislative Courts," the author, W. G. Katz, who prepared the same "in connection with graduate study in Harvard Law School in seminar courses of Professor Felix Frankfurter" (See Note, p. 894 of this article) at page 902 states: "It has thus been settled that all territorial courts and all courts of the District of Columbia, even those whose justices hold office during good behavior, are legislative courts." It was not until the decision in *O'Donoghue v. United States* (decided in 1933, a year after the Norris-LaGuardia Act was enacted) 289 U.S. 516, 77 L. ed. 1356, 53 S. Ct. 740, that the *Bakelite* ruling was held to be dictum and it was finally settled that District of Columbia courts were constitutional courts.

(R. 109-11) — all make it amply clear that the lower court adopted the only possible interpretation of the term "court of the United States" by excluding the territorial circuit courts from their purview. If, therefore, the Norris-LaGuardia Act applies to the Federal district court in Hawaii, which is a question not raised by the issues of this case, it applies through the adoptive provisions of sec. 86 of the Hawaiian Organic Act, supra, which are ample to achieve that result (*Balzac v. Porto Rico* (1922) 258 U.S. 298, 302, 66 L. ed. 627, 629, 42 S. Ct. 343, 344) without stretching the term "court of the United States" beyond its well-settled meaning. Hence the fears of Petitioners that a different effect might be given to the Clayton and Sherman Acts than to the Norris-LaGuardia Act in the Territory by the lower court's decision are unfounded.

REASON NO. IV (PETITION 10-11)

In Ground No. IV Petitioners in substance make claims, which for convenience we divide into four contentions: (1) that all acts enumerated in Sec. 4 of the Norris-LaGuardia Act are legalized under all laws of the United States; (2) that the rights granted by that Act are substantive; (3) that the courts below refused to give effect to such rights when they refused to prohibit the territorial circuit court from proceeding further in the injunction matter; and (4) that specifically the temporary restraining order issued by the territorial circuit court violated those substantive rights and that this was sufficient to require the issuance of a writ of prohibition forbidding the circuit court to proceed further in the injunction suit.

Assuming, without admitting, that claims (1) and (2) above are correct (and there certainly is doubt as to the correctness of Claim No. (1), in view of *Allen Bradley Co. v. Local Union No. 3* (1945) 325 U.S. 797, 89 L. ed. 1939, 65 S. Ct. 1533, which held that the immunization of labor unions under Sec. 4 of the Norris-LaGuardia Act did not prevent the specified acts of the union from being violations of the Sherman Act itself if the union joined with employers in creating a monopoly), the conclusions of Claims Nos. (3) and (4) supra do not follow.

Claims Nos. (3) and (4) supra make the assumptions (a) that the present proceeding for a writ of prohibition against the territorial circuit judge and the other respondent herein raises the issue that the temporary restraining order goes too far and denies a substantive right granted by the Norris-LaGuardia Act; and (b) that the alleged "legalization" of all labor union activities superseded any laws or law, not only of the United States, but of the Territory as well (using "laws" or "law" of the Territory in the sense of both local statutory law and the local general or common law) which might otherwise impose criminal or civil liability for acts done in the course of such activities, not involving

fraud or violence. That both of these assumptions are false is demonstrated by the following arguments:

1. NOWHERE IN THE RECORD IS THE QUESTION OF ALLEGED INFRINGEMENT OF SUBSTANTIVE RIGHTS RAISED.

R. L. Hawaii 1945, Sec. 10271, provides, with respect to the requirements in a petition for a writ of prohibition, that

> The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action brought against him, and *showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action,* which petition shall be verified by the oath of the applicant or by some person on his behalf cognizant of the facts. (Emphasis added.)

The Territorial supreme court, in *Carter v. Gear* (1905) 16 Haw. 412, 417-418, said:

> The propriety of issuing the restraining order in this instance cannot be inquired into upon prohibition. The question of power is the only one that can be considered . . . We cannot find that a circuit judge sitting in probate is absolutely without such power under the particular circumstances of this case so as to justify the issuance of a writ of prohibition.

In *Bandini Petroleum Co. v. Superior Ct.* (1931) 284 U.S. 8, 76 L. ed. 136, 52 S. Ct. 103, which was an appeal from the refusal of the California appellate courts to issue a writ of prohibition to a California trial court which had issued a temporary injunction under a California Statute for conservation of natural resources, the Supreme Court held that the writ of prohibition is not available as a substitute for an appeal from a court having jurisdiction; and that a petition for such a writ to restrain the enforcement of an injunction issued by another court cannot, by annex-

ing to and making a part of the petition the pleadings in the injunction suit and the affidavits presented upon the hearing of the application for preliminary injunction, or by a characterization of the evidence thus adduced, or by pleading the conclusions derived therefrom, substitute the court to which application for the writ is made for the court to which the writ is sought, in the determination of the facts, or of the law addressed to the facts, which should properly be considered by the latter tribunal.

If, therefore, the second circuit court had jurisdiction to issue an injunction in a labor dispute without complying with the formal and procedural requirements of the Norris-LaGuardia Act — on the theory sustained by the territorial supreme court that it was not a "court of the United States" within the meaning of that act — the propriety of the issuance of the injunction under the actual circumstances of the case would not, under the foregoing decisions, be a proper subject for the writ of prohibition, at least unless the injunction was absolutely void.

However, no claim was made before the supreme court of the Territory in the Petition for Writ of Prohibition (R. 15-21) or elsewhere in the recond, or even in the assignments of error (R. 5-7) that could be construed as a claim that substantive rights were infringed by the terms of the injunction. The only claim made throughout the entire case was that the petitioner in the injunction suit in the territorial circuit court had failed to make certain allegations, and the circuit court had failed to require compliance with or make findings in accordance with certain procedural requirements specifically named in the Petition of Writ of Prohibition, which Petitioners herein claimed were required by the Norris-LaGuardia Act, and which requirements Petitioners herein claimed were applicable directly to the territorial circuit court on the sole ground that it was literally a "court of the United States" under that Act.

The return of Judge Wirtz to the alternative writ of prohibition denied that the Second Circuit Court is a "court of the United States" within the meaning of the Norris-LaGuardia Act, (Paras. III-V, VIII; R. 46-50, 54-55). Likewise, the return of the Maui Agricultural Co., Ltd., denied that the Second Circuit Court was a "court of the United States" as defined in the Norris-LaGuardia Act and denied the act's applicability to a circuit court of the Territory (Paras. II and III; R. 56). Judge Wirtz's return further alleged that the temporary restraining order was properly and lawfully issued

> for good and sufficient cause and in accordance with the laws, practice and rules of court applicable to said Circuit Court and the Judge thereof presiding at chambers in equity. (Para. VIII; R. 54.)

The Petitioners made neither formal nor informal denial of the allegations of the returns, including the last quotation above from Judge Wirtz's return, and the Territorial Supreme Court found that the procedure followed by Judge Wirtz was "*admittedly* in conformity with the laws of the Territory," the procedure required by the Norris-LaGuardia Act being held not applicable to such circuit court as not being a "court of the United States" (Op. Terr. Sup. Ct., R. 58; on Rehearing, R. 77).

Nor do the assignments of error (R. 5-7) raise any contention of deprivation of substantive rights, or point out in any way any alleged substantive rights of which appellants have been deprived. Hence, the only issue before the territorial supreme court was not whether the terms of the restraining order itself deprived the appellants herein of substantive rights, but whether the Second Circuit Court was a "court of the United States" as defined in that Act. For this reason, it is submitted that the question of whether the Norris-LaGuardia Act, as construed in the *Hutcheson* case, supra, confers substantive rights is absolutely immaterial to the issues of this case.

However, an analysis of the "substantive rights" argument of Petitioners will make its immateriality to this case even more clear.

2. THE ALLEGED SUBSTANTIVE RIGHTS RELATE TO FEDERAL AND NOT TO TERRITORIAL LAW.

In the first place, it is clear from the Federal statutes themselves, which are relied upon by Petitioners, that the substantive rights granted by Sec. 4 of the Norris-LaGuardia Act and Sec. 20 of the Clayton Act relate to Federal law only and do not affect the law of the Territory of Hawaii.

Section 20 of the Clayton Act (29 U.S.C. 52) contains two paragraphs:

The first paragraph provides that, with certain exceptions, no restraining order or injunction shall be granted by any court of the United States in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment. The first paragraph relates to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in certain types of cases.

The second paragraph of Section 20 contains the critical provisions, and is as follows (italics supplied):

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peaceably obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or

> from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

The second paragraph refers to restraining orders and injunctions mentioned in the first paragraph, i.e., restraining orders and injunctions issued by courts of the United States in certain types of cases. The second paragraph provides that no such restraining order or injunction shall prohibit certain specified acts. To this extent the second paragraph, like the first paragraph, relates to procedural matters only, i.e., it limits the power of courts of the United States to grant injunctive relief in certain types of cases. However, the last clause of the second paragraph provides that none of the specified acts shall be considered or held to be violations of any law of the United States. The last clause is the basis of the substantive rights claimed under Section 20.

The motive behind the adoption of Section 20, including the last clause of the second paragraph thereof, was to restrict the issuance of restraining orders and injunctions in suits under the Sherman Act (15 U.S.C. 1-7), and also to amend the substantive provisions of the Sherman Act to provide that the specified acts should not be deemed to be in violation of the Sherman Act. And because of a suggestion made to Congress that certain judges had relied on federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute

cases it was provided in the last clause of the second paragraph that none of the specified acts should be considered or held to be in violation of *any* law of the United States – rather than merely in violation of the Sherman Act.

The legislative history of the last clause is extremely revealing on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present Section 20 was Section 18. At that time the language of the last clause was as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be unlawful."

The Senate Committee recommended that the word "unlawful" be eliminated and that the words "violations of the antitrust laws" be substituted. As so amended the language of the last clause would have been as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of the antitrust laws."

On the floor of the Senate an amendment was moved and adopted to substitute the words "any law of the United States" for the words "the antitrust laws." By this amendment the final language was adopted, as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be "unlawful." It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state

statutory law. It was further pointed out that the first of the specified acts was "terminating any relation of employment," and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible for an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary to the terms of the contract. The discussion and the changes made in the language of the last clause, establish that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) so that the provisions of the Sherman Act (and of any such other federal legislation) should not be deemed to prohibit any of the specified acts. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-14367.

The relationship of the substantive aspects of Section 20 of the Clayton Act to the general provisions of the Sherman Act is pointed out by the Supreme Court in *United States v. Hutcheson* (1941) 312 U.S. 219, 229-230, 236, 85 L. ed. 788, 791-2, 795, 61 S. Ct. 463, 465, and 468, in the following language:

> . . . Section 20 of that Act, . . . withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them — since the use of the injunction had been the major source of dissatisfaction — and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."
>
> * * *
>
> The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such *allowable conduct* from the taint of being a "violation of any law

> of the United States," including the Sherman Law.
>
> • • •
>
> It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

It is clear that the Supreme Court, in referring to "allowable conduct," meant conduct which was not in violation of any federal legislation, including the Sherman Act.[7]

Numerous decisions hold that Section 20 does not prohibit injunctions in labor dispute cases in state courts and does not in any way modify substantive state law. See, for instance, *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 85 L. ed. 836, 61 S. Ct. 552; *Carpenters & Joiners Union v. Ritter's Cafe* (1942) 315 U.S. 722, 738-739, 86 L. ed. 1143, 1153-4, 62 S. Ct. 807; *Weyerhaeuser Timber Co. v. Everett Dist. Council* (1941) 11 Wash. 2d 503, 119 Pac. 2d 643; *Isolantite v. United Electrical Etc., Workers* (1942) 132 N.J. Eq. 613, 29 Atl. 2d 183; *Western Electric Co. v. Western Electric Employees Association* (1946) 137 N.J. Eq. 489, 45 Atl. 2d 695, and *U. S. Elec. Motors v. United E. R. & M. Workers* (1946) 166 Pac. 2d 921, Super. Ct. of Calif., L. A. Co.

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Act (and any other federal legislation) should not be deemed to prohibit "terminating any relation of employment," to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights

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[7] That the substantive provisions of Section 20 of the Clayton Act operate only in the field of federal law is assumed by the Supreme Court. In *Allen-Bradley Co. v. Union* (1945), 325 U.S. 797, 807, 89 L. ed. 1939, 1947, 65 S. Ct. 1533, 1538-1539, the Supreme Court referred to the specific acts listed in Section 20 of the Clayton Act as having been declared by Section 20 "not to be violations of federal law."

and remedies for breach of contract than it intended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

The construction contended for by Petitioners would result in leaving the Territory absolutely helpless to pass criminal laws to protect the peace, public welfare and safety, or through the territorial courts to protect by injunction, or even by suit at law, private rights, in any case which grew out of a labor dispute, which did not involve fraud or violence.[8] There is no sound basis for such contention, particularly in view of the general rule that "an intention to supersede the local law (of a Territory) is not to be presumed, unless clearly expressed."

3. THE TERM "LAW OF THE UNITED STATES" AS USED IN SEC. 20 OF THE CLAYTON ACT AND IN THE DECISION IN THE HUTCHESON CASE, HAS A WELL-DEFINED MEANING, RECOGNIZED BY THE COURTS AND BY CONGRESS, WHICH DOES NOT INCLUDE THE LAW OF A TERRITORY.

A Territorial law is not a "law of the United States." *Maxwell v. Fed. Gold & Copper Co.* (8 Cir. 1907) 155 F. 110, 112; *Ex parte Moran* (8 Cir. 1906) 144 F. 594, 603. Similarly, it has been held that even an Act of Congress peculiarly local to the District of Columbia is not a "law of the United States." *Amer. Security & Trust Co. v. Comrs. of D. C.* (1912) 224 U.S. 491, 56 L. ed. 856, 32 S. Ct. 553; *Wash., Alexandria & Mt. Vernon Ry. Co. v. Downey* (1915) 236 U.S. 190, 59 L. ed. 533, 35 S. Ct. 406. See, also *People of Puerto Rico v. Rubert Hermanos, Inc.* (1940) 309 U.S. 543, 84 L. ed. 916, 60 S. Ct. 699, holding that sec. 39 of the Organic Act of Puerto Rico is not one of the "laws of the United States" within the purview of that provision of sec. 256 of the Judicial Code (28 USCA 371, now sec. 1355 of

[8] Actually, as stated ante, p. 3, violence was both alleged and proved before Judge Wirtz.

the New Judicial Code in revised form), which vested exclusively in the courts of the United States jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States."[9]

REASON NO. V (PETITION 11-12)

On its face, this alleged reason is so flimsy as to be hardly worthy of notice. It seizes upon a mere dictum in a case (not yet reported and not quoted in full) involving a crim-

[9] Congress itself distinguishes between laws of the United States and laws of a Territory, including Hawaii, in numerous Acts, including the following:

> The word "person," or "persons" . . . shall be deemed to include corporations and associations existing under or authorized by the *laws of* either *the United States,* the *laws of any of the Territories,* the *laws of any State,* or the *laws of any foreign country.* (Emphasis added.)
>
> Sherman Act, sec. 8, 15 USCA 7.
> Clayton Act, sec. 1, 15 USCA 12.

> Every contract, combination . . . is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal contracts . . . when contracts . . . of that description are lawful as applied to intrastate transactions, under any *statute, law,* or public policy now or hereafter in effect in any *State, Territory* or the District of Columbia . . . (Emphasis added.)
>
> Sherman Act, sec 1, as am. Aug. 17, 1937, 50 Stat. 693, 15 USCA 1.

See, also the following sections of the Hawaiian Organic Act *supra* making the same distinction:

Sec. 1 (48 U.S.C. 493) defining "laws of Hawaii"; sec. 5 (48 U.S.C. 495); extending to Hawaii all "laws of the United States" not locally inapplicable; sec. 6 (48 U.S.C. 496) continuing in effect, with certain exceptions, the "laws of Hawaii" not inconsistent with the Constitution or "laws of the United States"; sec. 55 (48 U.S.C. 562) extending legislative power (which is nothing more than the power to make "laws of Hawaii") to the local legislature over all rightful subjects of legislation not inconsistent with the Constitution and "laws of the United States" locally applicable; sec. 81 (48 U.S.C. 631) continuing in effect until the local legislature otherwise provides, the "laws of Hawaii" concerning the several courts and their jurisdiction and procedure; and sec. 83 (48 U.S.C. 635) continuing in effect, with certain qualifications, the "laws of Hawaii" relative to the judicial department.

inal prosecution decided by a three-judge district court not even having coordinate jurisdiction with the lower court, having no bearing upon the issues of this case, and which Petitioners expressly admit "does not involve the Norris-LaGuardia Act" (Petition 12) — as the basis for the allegation that the decision of the court below and the decision of the three-judge federal district court in Hawaii are in "apparent conflict."

As a matter of fact, the dictum in that three-judge decision was not even accurate in its evaluation of Judge Wirtz's decision, for Judge Wirtz had actually found that the acts of "threatened violence" were "borne out by the testimony and the affidavits on file," and had held in effect that the granting of the motion for a temporary restraining order was "for the sole purpose to prevent rioting and violence." (R. 41) Hence Judge Wirtz's remark that he would "follow the pattern set forth in the (unlawful assembly) statute and permit but three pickets," was nothing more than a finding that he found that under all the circumstances the number three mentioned in that statute was a reasonable limit for the allowable pickets at each point of ingress and egress.

REASON NO. VI (PETITION 12-13)

Petitioners in this ground no. VI first imply that the temporary restraining order of the Territorial circuit court prohibited peaceful picketing "in company camps used for residence purposes." As already pointed out ante, nowhere in the record is it shown that the areas covered by the order were company camps used for residence purposes, nor was this urged *at any time below* as a ground for the issuance of the writ of prohibition.

This ground No. VI also contends that because of the alleged prohibition of peaceful picketing in "company camps used for residence purposes" and otherwise circumscribing the right of peaceful picketing, the temporary

restraining order was "void on its face" under the Clayton and Norris-LaGuardia Acts, and the Constitution. This proposition is unsound for at least three reasons: First, as above stated, neither the record nor the order show on their face that the restraint was on mass picketing in company camps used for residence purposes. Secondly, in their Petition for Rehearing before the Territorial supreme court, Petitioners themselves stated: "The lawfulness of the Temporary Restraining Order under the laws of the Territory, and the Constitution and laws of the United States—other than the Norris-LaGuardia Act—is not in issue and was not argued before this court in this cause." (R. 73.) Thirdly, it is well settled that for acts of flagrant violence, even peaceful picketing may be temporarily enjoined. *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 85 L. ed. 836, 61 S. Ct. 552.

If the limit of three pickets at each point of ingress to and egress from the property of the company respondent herein, or the other restrictions on picketing, were unreasonable under the circumstances actually obtaining at the time, the remedy of the Petitioners herein was, not to attack Judge Wirtz's jurisdiction to act in the matter, which was clear, but to apply to Judge Wirtz and make a showing of such alleged unreasonableness and request him to set aside or amend the order so as to fix a reasonable number of pickets or eliminate or modify any restrictions considered unduly restrictive.

Petitioners had 11 days from the issuance of the restraining order to the return day (October 28, 1926) fixed in the Order to Show Cause (R. 36, 91), and themselves requested and secured two additional continuances for a total of 16 additional days (R. 93), making a total of 27 days within which they could have so applied. Instead of attempting in good faith to bring the alleged unreasonableness to Judge Wirtz's attention with appropriate showings of law and fact which might well have resulted in a modification of the

order if it was in fact too restrictive, Petitioners, according to the undenied and uncontradicted record and affidavits alleging violation of the order (R. 93-97), chose to follow the same willful and contumaceous course which was so strongly condemned in *United States v. United Mine Workers* (1947) 330 U.S. 258, 91 L. ed. 884, 67 S. Ct. 677, and thereafter chose to apply to the Territorial supreme court for the writ of prohibition which only questioned the general jurisdiction of Judge Wirtz under the Norris-LaGuardia Act to act in the case, and not the form of the temporary restraining order or its reasonableness.

Finally, we deny that the present proceeding for a writ of prohibition was one against "proceedings for contempt for alleged violation of the order." A reading of the petition for the writ (R. 15-21) will make this clear, for it merely prays for a writ of prohibition against Judge Wirtz prohibiting him from proceeding further in the injunction suit, whereas, the criminal contempt proceedings which are pending are entirely separate proceedings. We will not elaborate further on this point, as the brief of counsel in behalf of the Respondent Cable A. Wirtz fully covers the same.

However, we should like to add just this observation: That even if the contempt proceedings were within the scope of the issues of the present case, under the doctrine of the *United Mine Workers* case, supra, there is no reason to relieve Petitioners from the consequences of their willfully contumaceous acts, for if the question of the application of the Norris-LaGuardia Act to territorial circuit courts was sufficiently doubtful to induce both the Territorial supreme court and the Ninth Circuit Court of Appeals unanimously to sustain Judge Wirtz's jurisdiction to issue the order, it can hardly be said that the jurisdictional question was frivolous and insubstantial, and it was the duty of the respondents therein (Petitioners herein) to obey that order until reversed by the orderly processes of law, if

erroneous. For the purposes of this brief, we refer to and adopt the brief in behalf of the Respondent Cable A. Wirtz on this point.

In closing, we do not consider it necessary to comment upon the desperate resort of Petitioners to government reports, newspaper accounts, and other matters not in the record, to bolster up an obviously weak case. (See Petitioners' Brief, Petition p. 29, Notes 27, 30; p. 30, Note 31; p. 31, Note 32.) Like the Bible, excerpts from government reports (neither in the record nor brought up below in a manner that would enable opposing parties to cross-examine or otherwise bring out other relevant facts or even the inaccuracy or inapplicability of the statements or statistics — witness the recent government estimates of housing needs reported in the press which now appear to have missed four million newly constructed or rehabilitated housing units) properly chosen and edited, can be used to "prove" almost anything. Nor is it necessary to answer the references (Petition p. 29, Notes 28, 29, 30) to the tortured reasoning of *ILWU v. Ackerman* . . . F. Supp. . . . , decided December 27, 1948, which is now on appeal and upon which this Court, if it desires, will have full opportunity to pass directly, and which decision, as pointed out ante, pp. 26-27, is utterly disconnected with and immaterial to the issues of this case.

CONCLUSION

Having, as we believe, demonstrated that no sound and substantial ground has been alleged or shown for granting the Petition for a Writ of Certiorari, it is submitted that the same should be denied.

Respectfully submitted,

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APPENDIX A

ORGANIC ACT

An Act to Provide a Government for the Territory of Hawaii

CHAPTER I. GENERAL PROVISIONS

Sec. 1. Definitions. That the phrase "the laws of Hawaii," as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America.

The constitution and statute laws of the Republic of Hawaii then in force, set forth in a compilation made by Sidney M. Ballou under the authority of the legislature, and published in two volumes entitled "Civil Laws" and "Penal Laws," respectively, and in the Session Laws of the Legislature for the session of eight hundred and ninety-eight, are referrd to in this Act as "Civil Laws," "Penal Laws," and "Session Laws." (48 U.S.C. 493.)

Sec. 5. United States Constitution. That the Constitution, and, except as otherwise provided, all the laws of the United States. including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; **Provided,** That sections 1841 to 1891, inclusive, 1910 and 1912, of the Revised Statutes, and the amendments thereto, and an act entitled "An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes," approved July 30, 1886, and the amendments thereto, shall not apply to Hawaii. (As am. May 27, 1910, 36 Stat. c. 258, s. 1; April 12, 1930, 46 Stat. 160, c. 136; June 6, 1932, 47 Stat. 205, c. 207, s. 116 (b); 48 U.S.C. 495.)

Sec. 6. Laws of Hawaii. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States. (48 U.S.C. 496.)

Sec. 10. Construction of existing statutes. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; and those in favor of or against the Republic of Hawaii, and not assumed by or transferred to the United States, shall be equally valid in favor of or against the government of the Territory of Hawaii. All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law. No person shall be subject to imprisonment for nonpayment of taxes nor for debt. All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this Act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii: **Provided,** That no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach: **Provided further,** That the provisions

of this section shall not modify or change the laws of the United States applicable to merchant seamen.

That all contracts made since August twelfth, eighteen hundred and ninety-eight, by which persons are held for service for a definite term, are hereby declared null and void and terminated, and no law shall be passed to enforce said contracts in any way; and it shall be the duty of the United States marshal to at once notify such persons so held of the termination of their contracts.

That the Act approved February twenty-sixth, eighteen hundred and eight-five, "To prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," and the Acts amendatory thereof and supplemental thereto, be, and the same are hereby, extended to and made applicable to the Territory of Hawaii. (48 U.S.C. 501-504.)

Sec. 11. Style of Process. That the style of all process in the Territorial courts shall hereafter run in the name of "The Territory of Hawaii," and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii. (48 U.S.C. 505.)

CHAPTER II. THE LEGISLATURE

* * *

LEGISLATIVE POWER

Sec. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory;

but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; nor shall it grant private charters, but it may by general act permit persons to associate themselves together as bodies corporate for manufacturing, agricultural, and other industrial pursuits, and for conducting the business of insurance, savings banks, banks of discount and deposit (but not of issue), loan, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association. No divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application, but this provision shall not affect any action pending when this Act takes effect; nor shall any lottery or sale of lottery tickets be allowed; nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the Territorial legislature shall provide; nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government; nor shall the government of the Territory of Hawaii, or any political or municipal corporation or subdivision of the Territory, make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any

indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbors, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or the subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond ten per centum of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond five per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof; nor shall any bond or other instrument of any such indebtedness be issued unless made payable in not more than thirty years from the date of the issue thereof; nor shall any issue of bonds or other instruments of any such indebtedness be made after July 1, 1926, other than such bonds or other instruments of indebtedness in serial form maturing in substantially equal annual instalments, the first instalment to mature not later than five years from the date of the issue of such series, and the last instalment not later than thirty years from the date of such issue; nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States: **Provided,** That the legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes. (As am. May 27, 1910, 36 Stat. 443, s. 4; July 9, 1921, 42 Stat. c. 42, s. 302;

June 9, 1926, 44 Stat. 710, c. 512, ss. 1, 2; 48 U.S.C. 519, 562.)

CHAPTER IV. THE JUDICIARY

Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided. (48 U.S.C. 631.)

Sec. 82. Supreme court. That the supreme court shall consist of a chief justice and two associate justices, who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President: **Provided,** however, That in case of the disqualification or absence of any justice thereof, in any cause pending before the court, on the trial and determination of said cause his place shall be filled as provided by law. (48 U.S.C. 632.)

Sec. 83. Laws continued in force. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read, and write

the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen, and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts. (48 U.S.C. 635.)

Sec. 84. Disqualification by relationship, pecuniary interest, or previous judgment. That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated. (As am. May 27, 1910, 36 Stat. c. 258, s. 6; 48 U.S.C. 636.)

CHAPTER V. UNITED STATES OFFICERS

* * *

Sec. 86. Federal court. (a) That there shall be established in the said Territory a district court, to consist of two judges, who shall reside therein and be called district

judges, and who shall each receive an annual salary of $10,000, to be paid in monthly instalments. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

(b) The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President.

(c) The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States.

(d) Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States

to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. The said district judges shall appoint a clerk and a reporter of said court. The clerk of the district court with the approval of the judges thereof may appoint deputy clerks. (As am. March 3, 1905, 33 Stat. c. 1465, s. 3; March 3, 1909, 35 Stat. c. 269, s. 1; March 3, 1911, 36 Stat. 1167, c. 231, s. 291; March 4, 1921, 41 Stat. 1412, c. 161, s. 1; July 9, 1921, 42 Stat. c. 42, s. 313; June 1, 1922, 42 Stat. 599, 614, 616, c. 204, Title II; January 3, 1923, 42 Stat. 1068, 1084, c. 21; Title II; February 12, 1925, 43 Stat. 890, c. 220; February 13, 1925, 43 Stat. 936, c. 229, s. 13; December 13, 1926, 44 Stat. 919, c. 6, s. 1; January 31, 1928, 45 Stat. 54, c. 14, s. 1; 28 U.S.C. 345; 48 USC 641-645.)

APPENDIX B

References to and Excerpts From Congressional Record Re Local Autonomy for Territorial Courts and Procedure, in Connection with Passage of Hawaiian Organic Act.

MR. CULLOM . . . *We found a supreme court there, not to administer United States statutes, but to administer the laws of the Territory, which is preserved in the bill and which is in harmony, as we thought, with the general principles and interests of the Government of the United States as well as of that Territory.*

The plan of the bill is to retain the legislature, the system of local courts, purely to administer Territorial statutes, and to provide a United States judge to administer the United States laws . . . We believe there is *no occasion for changing everything there simply because we can and because in the Territories here in our own country we have United States judges to administer Territorial statutes as well as United States statutes.* We believe it is wise to *allow the judges of the local courts there to have entire control and jurisdiction over the local statutes of the Territory* and a *United States judge to administer the United States laws.* (Emphasis added.) (33 Cong. Rec. 1871.)

. . . *But the theory of this bill is that they have a supreme court, a circuit court, and other inferior courts,* and there are *appeals from one to another of the territorial courts, and those judges, either of the circuit or supreme court, have nothing to do with decisions on other statutes than those local to the islands. They exist just as in a State.* (Emphasis added.) (33 Cong. Rec. 1929.)

. . . I do not know that it is a matter of very great consequence whether those judges are appointed by the governor or by the President of the United States; but as we are *dealing with a settled community, a state, a government,* full of people, so far as it has gone — not a great number there yet — but there has been a *government established for a great many years;* they *have their system of courts, they have their system of law, they have their construction of statutes by their supreme court and circuit courts, and they are familiar with them, and they felt entirely satisfied with the system they have,* and it seemed to the commission and afterwards to the committee that *the less we interfered with them the better it was for the people there as well as for the United States generally* . . . .

So we found the supreme court there doing business with just as much dignity, with just as much sense of honor and of duty, and apparently with just as much intelligence as the supreme court of the State of Illinois or of Connecticut, or of any other State. There was nothing in the establishment there in any way that the commission could see would justify us in uprooting the supreme court or the circuit courts of the islands and requiring the Government of the United States to meddle with them. So it was the conclusion of the commission and of the committee that as far as that was concerned we ought to leave that alone at present. (Emphasis added.) (33 Cong. Rec. 2025.)

MR. MORGAN . . . there are other circumstances which have been forced upon the attention of Congress hitherto, chiefly by the sparsity of an educated and trained population in the Territories which we have heretofore organized. Heretofore, up to the present time indeed, except, I believe, in the case of Alaska, we have conferred upon what they call the United States courts in the Territories — the same courts the Senator from Connecticut is now trying to put upon the island of Hawaii — we have conferred upon them the power to enforce the laws of the United States, assuming under the decisions of the Supreme Court that Congress as the supreme sovereign over the Territories has the right to combine the powers of the State government and the powers of the Federal Government in the appointment of judicial officers for the Territories. We have conferred upon them *the double duty, and sometimes the irreconcilable duty, of passing upon questions that arise in the Territories themselves, and which concern private interests entirely, combining them with questions that arise under the laws of the United States and are entirely different in their purposes and in the means of execution from the Terri-*

torial or local laws. For instance, we have conferred upon those Territorial courts the power of admiralty in several cases.

Now what greater inconsistency can there be than that of a Territorial court exercising all of the local jurisdiction that belongs to a State court or county court or probate court or criminal court and uniting that with the jurisdiction conferred under the laws of the United States upon the district and circuit courts in admiralty? How are we to expect to find judges of sufficient breadth of learning, sufficient ability to manage these diverse and incongruous conditions? We have escaped heretofore for the reason that it has very seldom happened that our Territorial courts have been called upon to administer admiralty jurisdiction, but I can conceive of nothing more unseemly in legislation to provide judicial jurisdiction and officers than to place in the hands, for instance, of a circuit judge of the State of Alabama the power to determine and execute the laws of the United States in Alabama. If he can not do it properly in Alabama, if there are public reasons connected with the harmony of the judicial establishment why a circuit judge in Alabama can not exercise such power, how can we justify conferring double jurisdiction upon a Territorial court?

The Territorial court, under the decisions of the Supreme Court, derives from Congress, in view of its competent powers, *all of the rights of a circuit court of Alabama or any other State,* and also all of the rights, powers, and jurisdiction that belong to Federal courts. Those courts in practice have two dockets, one of which is for the disposal of cases that are local in their origin and in their effect — purely local litigation. The other docket relates to cases of the Government of United States or cases in which the Government of the United States is involved. *This committee, and the commis-*

sion, also, having some idea about this matter, undertook to get rid of this incongruity, this unnecessary mixing of two jurisdictions in the mind of a man serving two masters upon the bench, and we first of all separated the local courts in Hawaii entirely from the courts of the United States, and gave to them that kind of local jurisdiction that a circuit or other court in a State possesses.

Then in order that the Government of the United States might have its rightful powers exercised judicially in the Hawaiian Islands, the committee recommended that *a district court of the United States* should be established in those islands having a jurisdiction that is unequivocal, that is plenary, that has been defined by statute and by judicial decisions so that there is no doubt or dispute about its powers at all, and *that in that jurisdiction that judge, representing the Government of the United States, should preside in all cases where the laws and rights of the Government of the United States were involved.*

Now, is there any serious objection, is there any constitutional objection, can there by any objection in theory or in practice to establishing in the islands of Hawaii *the two separate jurisdictions just as they exist in the States?* . . . (Emphasis added.) (33 Cong. Rec. 2123-4.)

Similar sentiments are expressed in 33 Cong. Rec., by other Senators: Stewart (p. 1932-3), Foraker (1933-4, 2133), Cullom again (2189), Morgan again (2191-4, 2398-2400), Teller (2388-9, 2441), Nelson (2397).

In the debates in the House, on the same bill, the same views were expressed, Rep. Knox and Rep. Hamilton taking the leading part: See 33 Cong. Rec. 3771, 3801, 3859, and conference reports, pp. 4358, 4649, and 4733.